Supreme Court, U.S.
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No. 06-226

In The

Supreme Court of the United States

YOUNG J. PARK,

Petitioner,

v.

JEROME S. BRAUN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

YOUNG J. PARK
1035 Aster Ave., #2138
Sunnyvale, CA 94086
Phone: (408) 480-1591
Pro Se Petitioner

QUESTIONS PRESENTED

1. Justice Stevens states "If [Petitioners] were seeking admission to any other craft regulated by the state, they would unquestionably have such a right." Then, if Petitioners were seeking admission to any other precedents regulated by the state, would they unquestionably have such a right?

2. The U.S. Supreme Court states "Seventh Amendment assigns the decisions of fact to the jury." Then, can lower courts misinterpret the material facts against the existing documents instead of assigning the decisions of fact to the jury?

3. The state officials cannot discriminate the U.S. Supreme Court justices based on the present or future disability because it is against the public policy. Then, can the state officials discriminate the disabled applicants against the Due Process and Equal Protection Clauses?

PARTIES TO THE PROCEEDINGS

The Petitioner is Young J. Park. Respondents are Jerome Braun, Senior Executive, Admission, Debbie Barrientos, Section Chief, Accommodation Dept., Judy Johnson, Executive Director, Nineteen members of the committee of bar examiners in the State Bar of California and DOES 1-10, inclusive.

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OPINIONS BELOW

The unpublished opinion of the Ninth Circuit Court of Appeals affirms the district court's order granting Defendants' motion to dismiss with prejudice. (App. A)

The district court's order granting Defendants' motion to dismiss with prejudice was filed on April 11, 2005. (App. B)

JURISDICTION

On May 19, 2006, the United States Court of Appeals for the Ninth Circuit entered its judgment, App. A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment (Due Protection and Equal Protection (Am. XIV))

The Seventh Amendment (Decisions of fact to the jury)

42 U.S.C. §§12131-12132 (Discrimination)

42 U.S.C. §12133 (Enforcement)

42 U.S.C. §12133, Note 7 (Right of Action – Rehabilitation and Title II of Americans with Disabilities Act)

42 U.S.C. §1985 (Conspiracy to interfere with Civil Rights)

42 U.S.C. §1985(3) (Depriving Persons of Rights or Privileges)

(See Appendix for text of the Constitution and statutes)

STATEMENT OF THE CASE

This case was brought to the Federal District Court relied on Justice Stevens and other Justices' opinions and the U.S. Supreme precedents.

The Petitioner, a citizen of the United States, has a right to be protected by the U.S. Constitution and U.S. Supreme Court precedents.

In *Feldman*, Feldman did not graduate a law school that was regulated by the State. Justice Stevens states "If [Petitioners] were seeking admission to any other craft regulated by the state, they would unquestionably have such a right." [*D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 490 (1982)]

In the current case, Petitioner did graduate a law school. Only issue is "If Petitioners were seeking admission to the Supreme Court precedents regulated by the state, would they unquestionably have such a right?"

On October 21, 2004, Petitioner brought the case to the federal District Court based on the federal laws.

On April 11, 2005, the District court granted Defendants' motion to dismiss the complaint with prejudice. However, the district court has misinterpreted the material facts and its decision is against the U.S. Supreme Court precedents. For example, the district court states

"[Petitioner] also glimpsed a portion of *what he believed* to be his MBE answer sheet." Contrary to the district court's misinterpretation or guess, Defendants' Response to Demand for Inspection dated January 6, 2003, shows Defendants' objection to produce MBE answer sheet. This Court states "Seventh Amendment assigns the decisions of disputed questions of fact to the jury" [*Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958)]

On May 2, 2005, Notice of Appeal was filed.

On October 13, 2005, parties submitted all briefs. (App. D)

In California, all judges know 90-day rule. [90-day rule is a product of the constitutional provision that the judges will not receive their salaries if a case remains pending 90 days or more after submission [See Cal. Const. Art. VI, §19]

The case was undetermined for 218 days after it has submitted for decision on October 13, 2005. An unrelated attorney, Giannini, sent an email to Petitioner because "something is wrong."

On May 19, 2006, the court of appeals changed the parties' submission date and affirmed the district court's order granting Defendants' motion to dismiss with prejudice although Petitioner's claim is supported by Justice Stevens' opinions and this Court's precedents. (App. A)

REASONS FOR GRANTING THE PETITION

1. If Petitioners were seeking admission to any other precedents regulated by the state, Petitioners would unquestionably have such a right.

This court granted the petitions for *Feldman* and others. At that time the issue was whether craft or skill can substitute the state regulation because Feldman did not graduate a law school that was regulated by the state. Justice Stevens stated "If [Plaintiffs] were seeking admission to any other craft regulated by the state, they would unquestionably have such a right." [*D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 490 (1982)]

More than 20 years have passed since *Feldman* case was determined.

For the current case, all other state requirements are fully satisfied. Only remaining issue is "if [Petitioners] were seeking admission to any other precedents regulated by the state, would they unquestionably have such a right?"

Facts showed that the California State Bar's staff had transcribed the disabled applicants' answers to the MBE Scantron answer sheets wantonly. When "B" answer should be bubbled, parts of "A" and "C" were also bubbled. Consequently, the disabled applicants lost the scores unfairly.

In addition, according to the deposition transcripts, the speaker of the State Bar, Braun, testified the parts of Petitioner's examination answer sheets were destroyed around July when the inspection period ended on October 16. Their conducts were against the statute.

The California Supreme Court precedent states that the government may not benefit from its wrongdoing. [*Holt v. Kelly*, 20 Cal.3d 560, 566 (1978)] The California State Bar also made the precedent by stating "the Committee could award that person 20 extra points" to compensate the State Bar's misconducts.

Then, the California State Bar should not benefit from those destroyed papers during the inspection period because (1) its act was against the statute; (2) the California State Bar should not benefit from its own wrongdoing; (3) the destroyed papers cannot be evaluated.

Therefore, Petitioner's admission should be evaluated with the undestroyed MBE answer sheets. However, the California state bar, through Response to Demand for Inspection, unlawfully refuse to produce the wantonly transcribed MBE Scantron answer sheets because it will cause other disabled applicants' suits.

In this situation, all other MBE Scantron answer sheets should be used to evaluate Petitioner.

In sum, Petitioner should be admitted to practice of law based on the California Supreme Court precedent and the California State Bar's precedent because all other MBE Scantron answer sheets show higher scores than the passing scores or higher than 1440; (2) "state-created rule governing the grant or denial of license must comply with constitutional standards and must be administered in accordance with due process of law." [*D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 488 (1982)]

This court also states "The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and the

violation of the Fourteenth Amendment of the Constitution." [*Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886)]

Therefore, "If [Petitioner] was seeking admission to any other precedents regulated by the state, he would unquestionably have such a right." Currently, Petitioner is asking the limited license for a Pro Bono service only to help disabled people as soon as possible.

2. The function assigned to the jury is an essential factor in the process for which the Federal Constitution provides.

The district court stated "[Petitioner] also glimpsed a portion of *what he believed* to be his MBE answer sheet." However, this misinterpretation is against the U.S. Supreme Court precedent and the facts.

First, this Court interpreted the U.S. Constitution by stating "Seventh Amendment assigns the decisions of disputed questions of fact to the jury." [*Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537 (1958)] Therefore, the jury has to determine whether "transcribing the answers wantonly" carries discriminatory effect to the disabled applicants.

Second, the facts show that the California state bar, through Response to Demand for Inspection, unlawfully refused to produce the wantonly transcribed MBE answer sheets because they will cause other disabled applicants' suits.

Petitioner's opening brief to the court of appeals (p. 12) states "*C. Decisions of Fact should be assigned to the Jury.*" Since Petitioner requested the Jury Trial from the beginning, facts must be decided first by the Jury based on the U.S. Supreme Court precedents.

3. The state bar staffs cannot discriminate the disabled applicants against the Due Process and Equal Protection Clauses.

California state bar staffs ("Staffs") took the responsibility to transcribe the answers from the question book to the MBE Scantron answer sheets in participation in government program under Title II of Americans with Disabilities Act (ADA). Then, Staffs had the duty to transcribe the answers correctly and accurately. When "B" answer should be bubbled, parts of "A" and "C" were also bubbled. Then, the disabled applicants will lose scores in the bar examinations. The prohibition against discrimination against disabled in participation in government program under ADA applies to action that carries discriminatory effect, regardless of motive and intent. [42 U.S.C. §12132 Discrimination]

When Petitioner complained the California state bar's misdeeds to one staff (Braun), another staff (Barrientos) joined and deprived Petitioner's accommodation privilege. [42 U.S.C. §1985 Conspiracy to interfere with Civil Rights; 42 U.S.C. §1985(3) Depriving persons of rights or privileges; 42 U.S.C. §12131(2) Qualified individual with disability]

This Court states "The discrimination is, therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws and the violation of the Fourteenth Amendment of the Constitution." [*Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886)]

In sum, the California state staffs cannot discriminate the U.S. Supreme Court Justices based on the present or future disability because it is against the law and public

policy. Equally, the California state staffs cannot discriminate any disabled applicant against the Due Process and Equal Protection Clauses.

CONCLUSION

Therefore, this petition for a writ of certiorari should be granted.

DATED: August 11, 2006

Respectfully submitted,

YOUNG J. PARK,
Pro Se Petitioner

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YOUNG J. PARK, Plaintiff-Appellant, v. JEROME BRAUN; et al., Defendants-Appellees.	No. 05-15923 D.C. No. CV-04-04468-JW MEMORANDUM* (Filed May 19, 2006)

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Submitted May 15, 2006**

Before: B. FLETCHER, TROTT, and CALLAHAN, Circuit Judges.

Young J. Park appeals pro se from the district court's order dismissing his action alleging that the defendants discriminated, retaliated, and conspired against him in violation of the Americans with Disabilities Act, the Civil Rights Act of 1964, and other federal statutes. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim, *see Sprewell v.*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001), and we affirm.

The district court properly dismissed Park's action because his conclusory and farfetched allegations that the defendants altered and then destroyed his February 2000 bar examination materials do not support a cognizable claim. *See id.* (stating that on a motion to dismiss, the court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences"). Park's contention that the defendants ignored his requests for accommodation with respect to subsequent administrations of the bar examination is refuted by documents attached to the amended complaint. *See id.* ("The court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.").

Park's remaining contentions lack merit.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

YOUNG J. PARK, Plaintiff-Appellant, v. JEROME BRAUN, Senior Executive, Admission; et al., Defendants-Appellees.	No. 05-15923 D.C. No. CV-04-04468-JW **JUDGMENT**

Appeal from the United States District Court for the Northern District of California (San Jose).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Jose) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 05/19/06

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Young J. Park, Plaintiff, v. Jerome Braun et al., Defendant(s).	NO. C 04-04468 JW **ORDER GRANTING DEFENDANTS' REQUEST FOR JUDICIAL NOTICE AND GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE** (Filed Apr. 11, 2005)

I. INTRODUCTION

In his First Amended Complaint ("Amended Complaint"), pro se Plaintiff Young Park ("Plaintiff") names as defendants Jerome Braun, Debbie Barrientos, Judy Johnson, Nineteen Members of the Committee of Bar Examiners in the State Bar of California ("Committee"), and John Does 1-10 (collectively "Defendants"). Plaintiff claims Defendants discriminated against him because of his race and disability in violation of Title II of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a-2000a-6), Title II of the Americans with Disabilities Act (42 U.S.C. §§ 12131-12134), and 42 U.S.C. §§ 1981-1983, 1985(3). (Amended Complaint at 2:19-28, 3:1-13.) Presently before this Court is Defendants' Motion to Dismiss and Defendants' Request for Judicial Notice In Support of Motion to Dismiss. On March 14, 2005, this Court held a hearing regarding Defendants' Motion. For the reasons stated below, this Court grants Defendants' Request for Judicial Notice and

grants Defendants' Motion to Dismiss without leave to amend.

II. BACKGROUND[1]

Plaintiff sat for, and failed to pass, the February 2000 California State Bar exam. (Amended Complaint Ex, at 1:18.) Plaintiff had a disability for which he requested and received accomodation: on the Multistate Bar Examination (MBE) portion of the exam, which required applicants to indicate their answers by darkening "bubbles" on an answer sheet, Plaintiff was permitted to circle his answers in the question booklet and Bar staff later transcribed his answers to an answer sheet. (Amended Complaint Ex. at 11.)

When Plaintiff received notice of his failure to pass the Bar exam, he requested the opportunity to review his exam materials. (Amended Complaint at 8:9-10.) In particular, Plaintiff wished to review the MBE portion of the exam and compare his question booklet with the answer sheet. (Amended Complaint Ex. at 4:2-7.) Plaintiff corresponded with Defendant Jerome Braun, Senior Executive of Admissions of the State Bar, during 2000 and 2001 requesting inspection of his exam materials. (Amended Complaint at 8:9-10.)

In 2001, Plaintiff also corresponded with Defendant Debbie Barrientos in the State Bar Testing Accomodation Department with respect to future Bar exams. (Amended

[1] Despite the Court's careful review of the parties' briefs, some of the facts in this case remain unclear. The facts underlying this action are set forth to the best of the Court's ability.

Complaint Ex. at 24, 25.) It appears that Plaintiff registered to retake the Bar exam in July 2001, but rescheduled due to health reasons. (Amended Complaint Ex. at 25.) He then planned to take the February 2002 Bar exam, for which he requested and received approval for accomodations for his disability. (Amended Complaint Ex. at 23.) In January 2002, Plaintiff sent a letter advising Defendant Barrientos that he could not take the February 2002 exam and requesting accomodation for the July 2002 exam. (Amended Complaint at 23.)

Meanwhile, Plaintiff's requests to inspect his question booklet and answer sheet proved unfruitful (Amended Complaint Ex. at 26.) On January 15, 2002, Plaintiff filed a complaint for damages and injunctive relief in Santa Clara County Superior Court, naming Jerome Park, Debbie Barrientos, Judy Johnson, and the California State Bar Committee members as defendants. (Def. Req. for Jud. No. Ex. 1 at 15.) Plaintiff claimed that the Defendants violated. the State Bar Act (California Business and Professions Code Sections 6065 and 6045). (Def. Req. for Jud. Not. Ex. 1 at 1.) He also claimed fraud, negligent misrepresentation and negligence. (Def. Req. for Jud. Not. Ex. 1 at 1.)

Plaintiff continued to request his question booklet and answer sheet, and eventually brought his inspection request before the Committee of Bar Examiners. (Amended Complaint at 9:2-6.) Plaintiff then requested permission to address the Committee at its March 2003 meeting. (Amended Complaint Ex. at 30.) His request was denied. (Amended Complaint Ex. at 28.)

During discovery of his state action, Plaintiff learned that his essay answer book and performance tests had

been destroyed. (Amended Complaint Ex. at 1:18-25). He also glimpsed a portion of what he believed to be his MBE answer sheet. (Amended Complaint Ex. at 15:18-26, 16:1-26.) Plaintiff noticed that "[w]hen 'B' answer should be bubbled, parts of 'A' and 'C' were also bubbled." (Amended Complaint at 7:7-9.)

On February 27, 2003 the state court granted summary judgment in favor of the Defendants on the grounds that Plaintiff had failed to comply with the California Tort Claims Act. (Def. Req. for Jud. Not. Ex. 5 at 3.) A few weeks later, on March 14, 2003, Plaintiff requested leave to amend his complaint to include alleged violations of federal law. (Def. Req. for Jud. Not. Ex. 5 at 3.) His request was denied. (Def. Req. for Jud. Not. Ex. 5 at 3; Amended Complaint at 4:10-13.)

Plaintiff appealed to the Sixth District Court of Appeal. (Def. Req. for Jud. Not. Ex. 4.) The Court of Appeal affirmed the superior court's judgment. (Def. Req. for Jud. Not. Ex. 5.) Plaintiff then filed a petition for review with the California Supreme Court. (Def. Req. for Jud. Not. Ex. 6.) The California Supreme Court denied Plaintiff's petition. (Def. Req. for Jud. Not. Ex. 7.) Plaintiff filed a petition for a writ of certiorari with the United States Supreme Court. (Def. Req. for Jud. Not. Ex. 8.) The Supreme Court denied Plaintiff's petition. (Def. Req. for Jud. Not. Ex. 9.)

Plaintiff's current complaint alleges that Defendants discriminated against him "based on his disability, race, color, [and] national origin," and that they failed to provide reasonable accomodation in violation of the Americans with Disabilities Act. (Amended Complaint at 11:17-21.) At the hearing, this Court asked Plaintiff to describe his

disability. Plaintiff explained that his right arm and right hand were injured, such that he could not bubble in the MBE answer sheet. Plaintiff claims that Defendants would not provide accomodations for his disability for future Bar exams. (Amended Complaint at 8:11-13.) Plaintiff further alleges that Defendants Braun and Barrientos conspired against him, (Amended Complaint at 8:21-26.) He claims that Defendant Barrientos did not respond to his accomodation request for the February 2002 exam in retaliation to his inspection requests to Defendant Braun. (Amended Complaint at 8:14-22; Amended Complaint Ex, 21.) He also claims that Defendant Braun's supervisors, as well as the Committee members were aware of this conspiracy against Plaintiff and did nothing to "prevent harm to Plaintiff." (Amended Complaint at 9:5-10, 23-28 and 10:1:19.) Furthermore, he alleges that the Bar admission staff who transferred his written answer to an answer sheet, "maliciously transferred answers . . . to racially discriminate disabled applicants for their heincus pleasures." (Amended Complaint at 12:19-26.) Plaintiff seeks an "[i]njunction to . . . provide the same accomodation provided on June 27, 2000," and money damages. (Amended Complaint at 15: 23-28.)

Defendants move to dismiss Plaintiff's complaint on several grounds. First, Defendants argue that this Court lacks subject matter jurisdiction under *Rooker-Feldman*. Second, Defendants argue that Plaintiff's claims are barred by res judicata. Third, Defendants argue that Plaintiff fails to state a claim upon which relief can be granted. Fourth, Defendants argue that they are shielded from liability by the Eleventh Amendment.

Defendants also request judicial notice of nine documents detailing the prior state court proceedings[2] Plaintiff objects to judicial notice for the following reasons: 1) a denial of a petition for writ of certiorari has no precedential value and imports nothing about the merit of a case, and 2) the trial court judgment and order, and the Appellate Court decision were invalid because they ignored U.S. Supreme Court and California Supreme Court decisions.

III. STANDARDS

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The plaintiff bears the burden of establishing that subject matter jurisdiction is proper. *Id.* Dismissal is proper where the court lacks jurisdiction over the subject matter. Fed. R. Civ. P, 12(b)(1). Dismissal is also proper where the plaintiff fails to state a claim upon which relief can be granted, or where the defendant would be entitled to an absolute defense or bar to recovery. Fed. R. Civ. P. 12(b)(6); *see also Weisbuch v. County of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997).

A Rule 12(b)(1) jurisdictional attack may be facial or factual. *Safe Air v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2003). "In a facial attack, the challenger asserts that the

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[2] These are: 1) Plaintiff's Complaint, 2) Order for Summary Judgment by Superior Court, 3) Judgment by Court Under Code of Civil Procedure Section 437c, 4) Plaintiff's Notice of Appeal to Sixth District Court of Appeal, 5) Sixth District Court of Appeal's decision, 6) Plaintiff's Petition for Review to California Supreme Court, 7) Order Denying Petition for Review, 8) Petition for Writ of Certiorari to United States Supreme Court, and 9) Notice of Order Denying Petition for Writ of Certiorari.

allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that by themselves would otherwise invoke federal jurisdiction." *Id.* Because a facial attack challenges jurisdiction based on the allegations in the plaintiff's complaint, the court assumes the allegations to be true and draws all reasonable inferences in plaintiff's favor. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004).

A motion to dismiss under Rule 12(b)(6) must not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989). "[A] complaint should not be dismissed if it states a claim under any legal theory, even if the plaintiff erroneously relies on a different legal theory," *Haddock v. Board of Dental Examiners*, 777 F.2d 462, 464 (9th Cir. 1985). When evaluating a motion to dismiss under Rule 12(b)(6), the court reviews only the contents of the complaint. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996). Furthermore, "[a]ll material allegations in the complaint are to be taken as true and construed in the light most favorable to the non-moving party," and any existing ambiguities must be resolved in favor of the pleading. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986).

Complaints drafted by pro se litigants are held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Courts may dismiss a case without leave to amend if the Plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

IV. DISCUSSION

A. Judicial Notice is Proper

"[A] court may take judicial notice of a judicial or administrative proceeding which has a direct relation to the matters at issue." *United States v. So. Cal. Edison Co.*, 300 F. Supp.2d 964, 974 (E.D. Cal. 2004). In doing so, the court only notices "the *existence* of those matters of public record . . . but not of the *veracity* of the arguments and disputed facts contained therein." *Id.* (emphasis in original). Documents are judicially noticable "only for the purpose of determining what statements are contained therein, not to prove the truth of the contents or any party's assertion of what the contents mean." *Id.* at 975.

Plaintiff brings this action following his unsuccessful attempt to obtain relief in state court. Defendants' Motion to Dismiss is based in large part on the state court proceedings. The documents for which Defendants seek judicial notice are directly related to the matters at issue. Therefore, judicial notice is proper.

B. The *Rooker-Feldman* Doctrine Does Not Deny This Court Subject Matter Jurisdiction Over Plaintiff's Federal Claims

Defendants argue that this Court lacks subject matter jurisdiction over Plaintiff's First Amended Complaint under *Rooker-Feldman*. Plaintiff argues that *Rooker-Feldman* does not apply in this case because the state court judgment was not a valid decision. Plaintiff asserts that the summary judgment ordered by the trial court in his previous state action is invalid because the trial court "ignore[d] U.S. Supreme Court and California Supreme Court decisions." (Plaintiff's Opposition at 5:3-5.) This

Court disagrees with Plaintiff's reasoning, but nonetheless finds that *Rooker-Feldman* does not deny this Court subject matter jurisdiction over Plaintiff's federal claims.

As discussed above, jurisdictional challenges may be facial or factual. The *Rooker-Feldman* doctrine presents a facial attack because it challenges jurisdiction solely upon the allegations in the complaint.[3] Under the *Rooker-Feldman* doctrine, federal district courts lack jurisdiction to hear appeals of state court decisions. *Bianchi v. Rylaardsdam*, 334 F.3d 895, 896 (9th Cir. 2003). The United States Supreme Court articulated the following test in *D.C. Court of Appeals v. Feldman*, 460 U.S. 42 (1983):

> If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application [for relief], then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Id. at 483 n.16.

> United States District Courts . . . do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.

Id. at 486.

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[3] The doctrine takes its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Simply put, a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court. *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003). Thus, if a complaint on its face seeks a de facto appeal of a state court decision, *Rooker-Feldman* denies jurisdiction. Under *Rooker-Feldman*, a forbidden de facto appeal exists "when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court." *Id.* at 1163. *Rooker-Feldman* does not deny jurisdiction where the federal plaintiff complains of a legal injury caused by an adverse party. *Id.* Moreover, the "inexplicably intertwined" test comes into play only when there is already a de facto appeal in federal court. *Id.* at 1158; *see also Maldonado v. Harris*, 370 F.3d 945, 950 (9th Cir. 2004).

In this case, Plaintiff sued Defendants in state court for money damages and injunctive relief. After losing in state court and exhausting his appeals, Plaintiff filed suit in this Court claiming violations of his civil rights and seeking the same relief denied him in his prior action. Importantly, Plaintiff does not claim any legal injury arising out of the state court's judgment. Rather, Plaintiff claims legal injury arising out of Defendants' acts. Even though Plaintiff argues in his Amended Complaint and Opposition that the state court decision is invalid, Plaintiff's claims that Defendants violated his civil rights lie at the heart of his Amended Complaint. Thus, to the extent Plaintiff alleges that Defendants violated federal law, *Rooker-Feldman* does not deny jurisdiction.

C. Plaintiff's Claims Are Not Barred By Res Judicata (Claim Preclusion)

Second, Defendants argue that Plaintiff's claims are barred by the doctrine of res judicata (claim preclusion) because Plaintiff raised or could have raised his claims in the prior state court action. Plaintiff argues that res judicata does not bar his claims because 1) the trial court denied Plaintiff's request to amend his complaint and thus prevented him from bringing his federal question claims in state court, and 2) "there is no valid final judgment on the merits when [the] lower state court ignored and effectively voided adverse-higher-decisional laws." (Plaintiff's Opposition at 9:19-21,) This Court does not agree with Plaintiff's reasoning, but finds that res judicata does not bar his claims.

The term "res judicata" encompasses two effects: claim preclusion and issue preclusion. *Baker by Thomas v. GMC*, 522 U.S. 222, 233 n.5 (1998); *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088, 1095 n.3 (9th Cir. 1990). Under claim preclusion, a valid final adjudication of a claim precludes a second action on that claim or any part of it. *Id.* Under issue preclusion, an issue of fact or law that has been actually litigated and resolved by a valid final judgment binds the parties in a subsequent action, whether on the same or a different claim. *Id.* Summary judgment is a final judgment for purposes of res judicata. *See Jackson v. S. I. Hayakawa*, 605 F.2d 1121, 1125 n.3 (9th Cir. 1979). In this case, Defendants argue that Plaintiff's claims are barred by claim preclusion. (Defendant's Motion to Dismiss at 8:5-8.)

Federal courts may not employ their own rules of res judicata in determining the effect of state judgments. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518

(1984). Rather, federal courts must accept the rules of the state from which the judgment is taken. *Id.* "Preclusion in federal litigation following a judgment in state court depends on the Full Faith and Credit Statute, 28 U.S.C. § 1738, which requires the federal court to give the judgment the same effect as the rendering state would." *Noel*, 341 F.3d at 1164 (internal citation omitted).

In this case, this Court must apply California law to determine the preclusive effects of the earlier state court litigation between Plaintiff and Defendants. In California, a final judgment precludes further proceedings if they are based on the same cause of action. *Maldonado v. Harris*, 370 F.3d 945 (9th Cir. 2004). California courts employ the "primary rights" theory to determine what constitutes the same cause of action for claim preclusion purposes. *Id.*; *see also Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1143 (9th Cir. 2004) ("In California, a litigant is claim-precluded from bringing a previously unbrought claim only if that claim is part of the same 'primary right' as a claim decided in earlier litigation").

> The most salient characteristic of a primary right is that it is indivisible: the violation of a primary right gives rise to but a single cause of action, . . . As far as its content is concerned, the primary right is simply the plaintiff's right to be free from the particular injury suffered.

Maldonado, 370 F.3d at 952 (citing *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888 (2002)).

Additionally, "even though two suits involve the same nucleus of facts, they do not necessarily raise the same cause of action under California law." *Maldonado*, 370 F.3d at 953 (citing *Morris v. Blank*, 94 Cal. App, 4th 23 (2001));

see also Branson v. Sun-Diamond Growers, 24 Cal. App. 4th 327 (1994) (refusing to apply a "nucleus of facts" test for claim preclusion purposes). In *Maldonado v. Harris*, for instance, the court held that the plaintiff's federal claim was based on the primary right to advertise on his billboard (protected by the First Amendment), whereas the primary right in the prior state court litigation was the right of the people of California to be free from obtrusive advertising displays along major highways (protected by state law). The *Maldonado* court held that "[b]ecause the primary rights in the two suits are different, the causes of action are also different," and the judgment against the plaintiff in the state action did not bar his federal claims.

In this case, Plaintiff's state action was based upon his primary right to inspect his examination papers as provided by the State Bar Act.[4] (Def. Req. for Jud. Not. Ex. 1 at 4:14-17.) Plaintiff's federal action is based upon his primary right to be free from discrimination based on disability, race, color and national origin. (Amended Complaint at 11:13-21.) Although the claims involve the same nucleus of facts, the primary rights in the state and federal actions are different and, consequently, the causes of action are also different. Therefore, Plaintiff's claims are not barred by res judicata claim preclusion.

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[4] Cal. Bus. & Prof. Code § 6065(a)(1) provides, in relevant part, that an unsuccessful Bar applicant "has the right to inspect those of his or her examination papers that are in the actual, physical possession of the examining committee at the time the request for inspection is made."

D. Eleventh Amendment Immunity

Defendants argue that Eleventh Amendment immunity shields them from liability. Plaintiff argues that Defendants are subject to liability because, *inter alia*, he sues each individually, and not the State Bar as an entity.

Absent waiver by the state or valid abrogation by Congress, the Eleventh Amendment bars a damages action against a state in federal court. *Ky. v. Graham*, 473 U.S. 159, 169 (1985). It is well established in the Ninth Circuit that the State Bar is an arm of the state and subject to Eleventh Amendment immunity. *See Hirsh v. Justices of the Supreme Court*, 67 F.3d 708, 715 (9th Cir. 1995) ("sovereign immunity bars monetary relief from state agencies such as California's Bar Association and Bar Court"); *Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir. 1985) (finding that the Eleventh Amendment bars suit against California's State Bar Board of Governors and the Committee of Bar Examiners).

Additionally, a defendant acting in his or her official capacity receives the same immunity as the government agency for which he or she works.[5] *Konig v. State Bar of California*, 2004 U.S. Dist, LEXIS 19498, *12 (2004) (citing *Hafer v. Melo*, 502 U.S. 21, 25 (1991)). An official-capacity suit is treated as a suit against the state entity. *Ky. v. Graham*, 473 U.S. 159, 166 (1985). "It is *not* a suit against the official, personally, for the real party in interest is the entity." *Id.* (italics in original). In contrast, an

[5] However, the Eleventh Amendment does not bar an action where state officers are sued in their official capacity for injunctive or declaratory relief based on an ongoing violation of the plaintiff's federal constitutional or statutory rights. *See Ex Parte Young*, 209 U.S. 123 (1908).

individual-capacity suit for money damages "seeks to impose personal liability upon a government official for actions he takes under color of state law." *Id.* at 165.

"In many cases, the complaint will not clearly specify whether officials are sued personally, in their official capacity, or both." *Ky. v. Graham*, 473 U.S. 159, 167 n.14 (1985). In such cases, the course of the proceedings will typically indicate the nature of the liability sought to be imposed. *Id.* (citing *Brandon v. Holt*, 469 U.S. 464, 469 (1985)). In the Ninth Circuit, the court may determine the real party in interest is the state and a plaintiff's claims are barred by Eleventh Amendment immunity, even though the plaintiff sued state officials only in their private capacities. *Central Reserve Life Ins. Co. v. Struve*, 852 F.2d 1158, 1161 (9th Cir. 1988). "A state is deemed to be the real party in interest where the judgment sought would interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting, or to compel it to act." *Id.*

The court considers the basis of the claims and the nature of relief sought in determining whether an action is directed against an individual (private-capacity claim), or the state (official-capacity claim). *Id.* For example, seeking injunctive or declaratory relief under § 1983 indicates the state is the real party in interest, (*Id.*, at 1160-1161) while seeking damages indicates that the intended defendants are being sued as individuals (*Price v. Akaka*, 915 F.2d 469, 473 (9th Cir. 1990)). Additionally, because the defense of qualified immunity is only available to private-capacity defendants, a defendant raising such a defense may be considered a private-capacity defendant. *Lundgren v. McDaniel*, 814 F.2d 600, 604 (11th Cir. 1987).

1. Plaintiff's Private-Capacity Claims For Damages Under § 1983 Are Not Barred; Plaintiff's Official-Capacity Claims For Prospective Injunctive Relief Are Not Barred

"State officers acting in their official capacities, like States themselves, are not amenable to suite for damages under § 1983." *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 69 n.24 (1997). However, state officers are subject to § 1983 liability for damages in their personal capacities, even when the conduct in question relates to their official duties. *Id.* (citing *Hafer v. Melo*, 502 U.S. 21, 25-31 (1991)).

In this case, Plaintiff sues Defendants in their individual capacities seeking money damages and injunctive relief. For the reasons stated above, Defendants are not absolutely immune from Plaintiff's claim for money damages under § 1983.[6] As such, Plaintiff's § 1983 claim for damages is not defeated on Eleventh Amendment immunity grounds.

Because Plaintiff also seeks prospective injunctive relief, however, this Court determines that Plaintiff states claims against Defendants in their official capacity as well. Plaintiff's claims are barred to the extent that Plaintiff seeks damages from Defendants in their official capacity. Plaintiff's claim for prospective injunctive relief, however, is not barred by Eleventh Amendment immunity. *See supra* note 5; *see also Ky. v. Graham*, 473 U.S. at 167 ("official-capacity actions for prospective relief are not

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[6] An official in a personal-capacity action may be able to assert qualified immunity as an affirmative defense. The Court does not address that issue here, as it has not been raised.

treated as actions against the State"); *Central Reserve Life Ins. Co.*, 852 F.2d at 1161 (citing *Ex Parte Young*, 029 U.S. 123 (1908)).

2. *Plaintiff's Private-Capacity Claims Under § 1985 Are Not Barred; Plaintiff's Official-Capacity Claims Under § 1985 Are Barred*

Plaintiff's official-capacity claims against Defendants are barred by Eleventh Amendment immunity. Defendants are not absolutely immune, however, from Plaintiff's private-capacity claims. Because Defendants have not raised qualified immunity as an affirmative defense, this Court does not address that issue here and presumes Plaintiff's private-capacity claims under § 1985 are not barred on immunity grounds.

3. *Plaintiff's Title II ADA Claims Are Not Barred By Eleventh Amendment Immunity*

The Ninth Circuit has held that Congress validly abrogated the states' Eleventh Amendment immunity under Title II of the Americans with Disabilities Act ("ADA"). *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1185 (9th Cir. 2003). Thus, the State is not entitled to Eleventh Amendment immunity under Title II of the ADA. *Phiffer v. Columbia River Cor. Inst.*, 384 F.3d 791, 792 (9th Cir. 2004).

As discussed above, this Court finds that Plaintiff sues Defendants in both their private and official capacities. Neither Plaintiff's private-capacity nor official-capacity claims against Defendants for violations of Title

II of the ADA are barred by Eleventh Amendment immunity.

4. Plaintiff's Civil Rights Act Claims Are Not Barred By Eleventh Amendment Immunity

The Supreme Court has established that Congress abrogated Eleventh Amendment immunity for claims under Title II of the Civil Rights Act. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448 (1976). Therefore, Defendants are not immune from Plaintiff's claims of violations under Title II of the Civil Rights Act of 1964.

E. Plaintiff Fails To State Facts Sufficient To Constitute A Claim Upon Which Relief May Be Granted

During the March 14, 2005 hearing on this motion, this Court asked Plaintiff why he suspected his answers had been incorrectly recorded. Plaintiff replied that he thought the February 2000 Bar exam was easy and that he believed he had correctly answered every question. He stated that when he learned he did not pass, he suspected it was because his answers had not been accurately transcribed. Plaintiff stated that his suspicions grew when he was unable to inspect his test materials. In his Amended Complaint, Plaintiff claims that he was discriminated against during the February 2000 Bar exam because "staffs [sic] maliciously transferred answers to Scantron sheets to racially discriminate disabled applicants for their heinous pleasures." (Amended Complaint at 12:23-27.) Plaintiff also alleges that although Defendants provided accomodations for his disability in the past, he "realized Defendants would not provide the legal

accomodation anymore" when he received no response to his accomodation request letters. (Amended Complaint at 8:11-15.) Plaintiff alleges that the Defendants conspired to deprive Plaintiff of his rights in retaliation for Plaintiff's ongoing inspection requests to Defendant Braun, and Plaintiff's pending state action. Plaintiff does not identify his race, color, ethnicity, national origin, or disability in his First Amended Complaint.

1. Plaintiff Has Not Stated a Claim for Relief Under § 1983 for Violations of the the Americans with Disabilities Act or the Civil Rights Act of 1964

To establish a claim for relief under § 1983, plaintiffs must establish that 1) they were deprived of a right, privilege or immunity secured by the Consitution or laws of the United States, and that 2) the alleged deprivation was committed under color of state law. 42 U.S.C. § 1983; *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49 (1999). Section 1983 is not itself a source of substantive rights, but rather is a remedy for violations of rights conferred by the United States Consitution and federal statutes. *Baker v. McCollan*, 443 U.S. 137, 145 (1979). "Plaintiffs must assert a specific federal constitutional or statutory right in order to maintain a claim" under § 1983. *Brown v. Borough of Mahaffey*, 35 F.3d 846, 850 (3d Cir. 1994). One cannot simply claim a "violation of § 1983" because the statute alone does not protect against anything. *Rural Water System #1 v. City of Sioux Center, Iowa*, 967 F. Supp. 1483, 1504 (N.D. Iowa 1997) (internal citations omitted).

Plaintiff does not identify which of his civil rights underlie his § 1983 claim. Liberally construing Plaintiff's

complaint, it appears that Plaintiff seeks relief under § 1983 for violations of Title II of the Americans with Disabilities Act and Title II of the Civil Rights Act of 1964 ("Civil Rights Act").

a. A Claim For Relief Under § 1983 Cannot Be Based On Title II of the ADA

Some courts have held that the relief for violations of the ADA may not be sought under § 1983 because the ADA contains its own remedial provisions.[7] *See Pona v. Cecil Whittaker's, Inc.*, 155 F.3d 1034 (8th Cir. 1998) (§ 1983 claim cannot be based on ADA violation because remedies for Title II of the ADA are comprehensive and exclusive); *Kagan v. Nevada*, 35 F. Supp. 2d 771, 772 (N.D.Nevada 1999) (because the ADA provides a comprehensive enforcement mechanism, a separate claim under § 1983 is not permitted); *see also Dept. of Education v. Katherine D.*, 727 F.2d 809, 820 (9th Cir. 1983) ("Where Congress has provided a comprehensive enforcement and remedial scheme in enacting a regulatory statute, the Supreme Court has held, we must read the statute to supplant any remedy that would otherwise be available under § 1983").

This Court adopts the guidance provided by the Ninth Circuit and finds that a claim for relief under § 1983 cannot be based upon a violation of Title II of the ADA.

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[7] 42 U.S.C. § 12133 provides: "The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a) shall be the remedies, procedures, and rights this tile provides to any person alleging discrimination on the basis of disability in violation of section 202 (42 U.S.C. § 12132)."

b. Plaintiff Has Not Shown A Violation of Title II of the Civil Rights Act

Title II of the Civil Rights Act of 1964 guarantees equal access to public places without discrimination or segregation on the ground of race, color, religion, or national origin. 42 U.S.C. § 2000a, et seq. Examples of public places under the statute include: inns, hotels, motels, restaurants, cafeterias, lunch rooms, lunch counters, retail establishments, gas stations, movie houses, theaters, concert halls, sports arenas and stadiums. *Id.*

> From the plain language of the statute, it is clear Congress' intent in enacting Title II [of the Civil Rights Act] was to provide a remedy only for discrimination occurring in facilities or establishments serving the public: to conclude otherwise would obfuscate the term 'place' and render nugatory the examples Congress provides to illuminate the meaning of the word.

Clegg v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994).

Plaintiff has not alleged any facts supporting his assertion that the Civil Rights Act of 1964 applies here. Plaintiff has failed to allege facts that he was denied access to a "public place" within the meaning of the statute, or that any such descrimination was on the ground of race, color, religion, or national origin. Plaintiff fails even to identify his race, color, religion or national origin. Plaintiff alleges only the thinnest of facts in support of his claim of discrimination. Plaintiff claims that he briefly saw his MBE answer sheet and noticed that "when 'B' answer should be bubbled, parts of 'A' and 'C' were also bubbled." (Amended Complaint at 12:21-23.) Plaintiff presents this as proof that "Defendants' staffs [sic] maliciously

transferred answers to Scantron answer sheets to racially discriminate disabled applicants for their heinous pleasures." (Amended Complaint at 12:23-26.) Such conclusory statements are insufficient to establish a violation of the Civil Rights Act.

Because Plaintiff has failed to show that Defendants deprived him of a right, privilege or immunity secured by the Consitution or laws of the United States, dismissal of his § 1983 claim is proper.

2. Plaintiff Has Not Stated Facts Sufficient to Constitute A Claim Under § 1985

Section 1985 proscribes conspiracy to interfere with civil rights. 42 U.S.C. § 1985(3). A §1985 claim must allege facts to support the allegation that defendants conspired together. *Karim-Panahi v. Los Angeles Police Dept*, 839 F.2d 621, 626 (9th Cir. 1988). A mere allegation of conspiracy without factual specificity is insufficient. *Id.*; *see also Jenson v. Sweet Home One Care Facility*, 2005 U.S. Dist. LEXIS 1711, *20-*21 (N.D.Cal. 2005) ("Using the word 'conspiracy' repeatedly and making unsupported legal conclusions that a conspiracy existed is insufficient to prove such a claim"). To state a cause of action under § 1985, a plaintiff must allege specific facts with respect to the following requirements:

> 1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; and 3) an act in furtherance of this conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (citing *Griffen v. Breckenridge*, 403 U.S. 88, 102-103 (1971)).

Furthermore, the plaintiff must demonstrate that the deprivation of a legally protected right was motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's action. *Id.*

In this case, Plaintiff seeks relief under § 1985, alleging that Defendants conspired to violate his rights as secured by the Civil Rights Act and Americans with Disabilities Act. However, Plaintiff fails to state facts sufficient to maintain such a claim. Plaintiff pursued his inspection request with Defendant Braun and the Committee, and was dissatisfied with the results. Plaintiff was also disappointed when he did not receive a response regarding his latest accomodations request. Plaintiff concludes that this proves Defendants conspired against him.[8] His conclusory statements and accusations, devoid of factual specificity, cannot withstand a Rule 12(b)(6) motion to dismiss. *Halkin v. VeriFone, Inc.*, 11 F.3d 865, 868 (9th Cir. 1993) (conclusory allegations of law and unwarranted inferences are insufficient to state a claim); *see also Transphase Sys. v. Southern Cal. Edison Co.*, 839 F. Supp, 711, 781 (C.D. Cal. 1995) (the court need not accept as true conclusory allegations or unreasonable inferences).

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[8] "Plaintiff only complained to Defendant Braun. Suddenly, Defendant Barrientos, from a different department, pretended she had not received Plaintiff's accomodation-request-letters. What does this evidence prove?" (Plaintiff's Opposition at 13:5-9.)

3. *Plaintiff Has Not Stated Facts Constituting A Claim for Relief for Violations of Title II of the Americans with Disabilities Act*

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Title II of the ADA forbids discrimination against persons with disabilities with respect to public services, programs, and activities. *Tennessee v. Lane*, 541 U.S. 509, 1984 (2004). The ADA broadly defines "public entity" as "any State or local government and any department, agency, special purpose district, or other instrumentality of a State or States or local government. *See* 42 U.S.C. § 12131; see *also Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (internal citations omitted). As discussed previously, the State Bar is an arm of the state and so may be considered a public entity for the purposes of Title II of the ADA.

To establish a cause of action under Title II of the ADA, a plaintiff must show that 1) he is disabled, 2) he meets the essential eligibility requirements for the services, program or activities provided by the public entity, 3) the public entity defendant excluded his participation in or denied him the benefits of a service, program or activity, or 4) otherwise subjected him to discrimination on the basis of his disability. 42 U.S.C. §§ 12131(2)-12132; *see also Duffy v. Riveland*, 98 F.3d 447, 455 (9th Cir. 1996). The ADA defines "disability" with respect to an individual as: (A) a physical, or mental impairment that substantially limits one or more of the major life activities of such

individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

In this case, Plaintiff has failed to show that Defendants excluded his participation in, or denied him the benefits of a service, program or activity. Plaintiff claims Defendants would not provide accomodations for him in the future, but his speculative belief is not sufficient to establish a claim. He offers no facts to support his allegations that he is being refused accomodation, or being relegated to taking the Bar exam without accomodation. Quite the contrary, Plaintiff's Complaint shows that Defendants consistently granted his past requests for accomodation, even as Plaintiff repeatedly rescheduled his taking of the exam. (Amended Complaint Ex. at 11, 23-25.)

For these reasons, Plaintiff has failed to state a cause of action under Title II of the ADA and dismissal is proper.

4. Plaintiff Failed To State a Cause of Action Under the Civil Rights Act of 1964

As discussed above, Plaintiff has failed to establish that the Civil Rights Act of 1964 applies here. Plaintiff has not alleged any facts from which this Court might conclude that Defendants denied him equal access to a "public place" within the meaning of the statute. Thus, dismissal is proper.

V. CONCLUSION

Plaintiff's Complaint is not barred by the *Rooker-Feldman* doctrine or res judicata. Plaintiff's § 1983 claims for money damages against Defendants in their official

capacity are barred by Eleventh Amendment immunity. Plaintiff's § 1983 claims for 1) money damages against Defendants in their private capacity, and 2) injunctive relief against Defendants in their official capacity are not barred by Eleventh Amendment immunity. Plaintiff's § 1985 claims against Defendants in their official capacity are barred by Eleventh Amendment immunity, but Plaintiff's § 1985 private-capacity claims are not barred. Plaintiff's Title II of the ADA and Civil Rights Act claims are not barred by Eleventh Amendment immunity.

However, Plaintiff failed to state a claim for relief under § 1983 for violations of Title II of the ADA or Civil Rights Act, Plaintiff also failed to allege facts sufficient to state a claim under § 1985, Title II of the ADA, and the Civil Rights Act. For the fore-mentioned reasons, this Court GRANTS Defendants' Request for Judicial Notice, and GRANTS Defendants' Motion to Dismiss.

During the hearing, this Court asked Plaintiff what facts led him to believe his civil rights had been violated. Plaintiff stated that he knew after taking the Bar exam that he had gotten every answer right. The Court noted that the Bar exam is very difficult, and that half of those who take it do not pass. Plaintiff replied that it had been an easy exam, and that he had answered each question correctly. Plaintiff explained that when he received notice that he did not pass, he immediately suspected his answers had not been properly transcribed.

Based upon this Court's dialogue with Plaintiff at the hearing, it appears to this Court that Plaintiff cannot cure the defects in his Complaint through amendment. Therefore, dismissal is granted without leave to amend.

Dated: April 8, 2005

/s/ James Ware
JAMES WARE
United States District Judge

APPENDIX C

The Fifth Amendment [Due Protection and Equal Protection (Am. XIV)]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment (Decisions of fact to the jury)

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fourteenth Amendment (Section 1)

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

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42 U.S.C §§12131

(1) Public entity

The term "public entity" means –

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49)

(2) Qualified individual with disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

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42 U.S.C. §12132 Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by

reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of the public entity, or be subjected to discrimination by such entity.

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42 U.S.C. §12133 Enforcement

The remedies, procedures, and the rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

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42 U.S.C. §12133, Note 7. Right of action

Neither Rehabilitation Act nor Title II of Americans with Disabilities Act (ADA) bars a suit against state officials in their official capacities for injunctive relief, nor does either create a remedial scheme so elaborate that it could be thought to preclude private remedies under *Ex parte Young*.

42 U.S.C. § 1985 Conspiracy to interfere with civil rights

42 U.S.C. §1985(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or

Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX D

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 05-15923 Filed: 5/18/05
Nsuit: 3440 Other civil rights (Fed)
Park v. 04aun, et al
Appeal from: Northern District of California (San Jose)

5/18/05	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellant's designation of RT is due 5/12/05; appellee's designation of RT is due 5/23/05,, ; appellant shall order transcript by 6/1/05; court reporter shall file transcript in DC by 7/5/05; certificate of record shall be filed by 7/11/05; appellant's opening brief is due 8/18/05; appellees' brief is due 9/19/05,, ; appellants' reply brief is due 10/3/05; [05-15923] (kkw)
7/7/05	Copy of letter received from Young J. Park to ct rptr Irene Rodriquez re status of transcript. casefile. [05-15923] (crw)
7/22/05	Filed certificate of record on appeal. TR ordered – 3/14/05. CASEFILE [05-15923] (gar)
8/15/05	Filed original & 15 copies Appellant Young J. Park opening brief (Informal: n) 21 pages & 5 Excs in 3 Vols.; served on 8/15/05 [05-15923] (gva)
9/14/05	14 day oral extension by phone of time to file Appellee's brief. [05-15923] appellees' answering brief due October 3, 2005; and the optional reply brief is due 14 days after service of the answering brief. (amt)

10/3/05	Filed original and 15 copies appellee Jerome Braun, Debbie Barrientos, Judy Johnson, Nineteen Members of's 31 pages brief, 0 Exc. vols: ; served on 10/3/05 [05-15923] (sf)
10/13/05	Filed original & 15 copies Young J. Park reply brief (Informal: n) 14 pages; served on 10/13/05 [05-15923] (gva)
11/8/05	FILED CERTIFIED RECORD ON APPEAL IN: 3 Clerks files, 1 Rt, 1 folder w/Bulky document #20, [05-15923] (jas)